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IN THE

Supreme Court of the United States.

TERM, 1950.

No. .

GEORGE F. CROESSANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, George F. Croessant, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Court of Appeals for the Third Circuit, in an opinion filed November 28, 1949, (R. 83) petition for rehearing denied December 28, 1949, (R. 91) affirming the judgment of the United States District Court for the Eastern District of Pennsylvania convicting petitioner of violating section 145 (b) of the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. A. section 145 (b). On January 3 and 4, 1949, petitioner having waived jury trial was found guilty in a trial before Judge Guy K. Bard.

Petitioner was sentenced to imprisonment for thirty-five days and to pay a total fine of $1000.00. Petitioner is at liberty on bail pending final disposition of the case.

On January 26, 1950, the time for filing this petition was extended to and including February 10, 1950 (R. 92).

A.
STATEMENT OF THE CASE.

George F. Croessant, the petitioner, was indicted for violation of section 145 (b) of the Internal Revenue Code, 26 U. S. C. A. section 145 (b). This section makes guilty of a felony "Any person who wilfully attempts in any manner to evade or defeat any tax. . . ." The indictment charged that G. F. Croessant willfully and knowing attempted to defeat or evade a large part of the income tax due by him for the years 1942, 1943, 1944 and 1945. The indictment charged that the defendant filed and caused to be filed false and fraudulent tax returns for each of those four years in that: the 1942 return showed a net income of $35,078.82 and total tax due of $15,388.74 whereas the net income in fact was $86,022.98 upon which the tax was $52,562.02; the 1943 return showed a net income of $44,143.69 and total tax due of $26,495.59, whereas the net income in fact was $81,502.46 upon which the tax was $51,330.87; the 1944 return showed a net income of $35,116.60 and total tax due of $16,878.40, whereas the net income was $45,116.60 upon which the tax was $23,922.45; and that the 1945 return showed a net income of $32,668.79 and total tax due of $15,219.71, whereas the net income in fact was $51,882.32 upon which the tax was $29,023.21.

Petitioner was tried on January 3 and 4, 1949 before Judge Guy K. Bard, sitting without a jury.

At the outset of the trial, Government counsel stated that "The evasion consists of two things, sir; a failure to report sales and an overstatement of expenses incurred in the sales" (R. 7). The Government made no charge that the defendant kept a double set of books, made false entries or alterations, issued false invoices or documents, destroyed books or records, concealed his assets or covered up the sources of his income or handled his affairs to avoid making the records usual in transactions such as he engaged in. The sole charge of evasion was that the defendant

failed to include in his return certain sales and overstated certain expenses incurred in the sales. As the Revenue Agent Rolph, testifying for the Government, put it, "We did not accuse him of hiding anything in his books" (R. 30).

Mr. Croessant, over 60 years of age, is a resident of Wyomissing, Pa. He was born in Reading, Pa. and has been a machinist and toolmaker for forty-five years (R. 50). During the years in question he was doing war work, making tools, special parts and engaging in certain experimentation (R. 51). His little plant worked three shifts, with a maximum of forty-two employees (R. 51). Two persons worked in the office; one of whom, Government witness Dorothy Gish, kept his books (R. 51). The other was a timekeeper who had charge of the payroll (R. 34). When he first started in business in the "early twenties", he employed an accountant; but never thereafter until shortly before this matter arose (R. 51). He did not employ any counsel until shortly prior to this difficulty (R. 51). Mr. Croessant designed his own form of book records, which were kept in 1944 and 1945 (R. 51). According to Internal Revenue Agent Howard R. Rolph, who testified for the Government, "All his sales are reported in his books sir" (R. 29). And all of his sales receipts were deposited in his bank account (R. 13; 15). His books did not show any fictitious "expenses". Indeed, for the years 1942 and 1943 his books showed only $54.97 and $535.39 as expenditures for advertising (R. 17; 25). On his 1942 return he showed $1554.97 as advertising expenses and on his 1943 return he showed $1535.38 as advertising expenses (R. 17; 25). With the exception of these two items, every disbursement set forth on his returns was made and reflected as an actual expenditure on his books (R. 21; 26-27). Mr. Croessant explained these two items as representing moneys he had actually spent on various trips to New York and other promotional expenses, for which no provision was made in his self-designed books (R. 61). During each of these two years his total sales were approximately $150,000 (R. 61)

and his total disbursements were over $140,000 (R. 25). The "overstatement" of expenses consisted in his listing actual expenditures as "business expenses" whereas the Revenue Agent concluded that they were not deductible as operating expenses but were principally capital expenditures, (such as the purchase of machinery, automobile, furniture, fixtures and other equipment) (R. 18-28). The Revenue Agent conceded that there were no improper deductions on the defendant's 1944 and 1945 returns (R. 29). He also conceded that Mr. Croessant had erred *against* himself in computing total deductible expenses on his 1942 return (R. 20); and the total of disbursements set forth on his 1943 return was actually some $400. less than the total disbursements reflected on his books (R. 25-26).

Dorothy Gish testified for the Government that she had kept the books from 1943 until 1946; that Mr. Groessant told her how to keep the books and that he prepared his own returns without the assistance of an accountant (R. 31-32).

John A. Beard, a certified public accountant, testified that he was first employed by the defendant in December 1946 in connection with the prospective incorporation of Mr. Croessant's business. While attempting to determine the assets and liabilities, the Internal Revenue Agent appeared on the scene. Mr. Croessant asked Mr. Beard to discuss the matter with the agent (R. 35). Mr. Beard and his staff worked with the revenue agents and together the correct figures were reached and on the basis of these, amended returns were filed and the additional tax paid in the correct amount (R. 8; 36). Mr. Beard testified that neither the books nor the returns were prepared on cash basis (R. 40) and first said they were kept on accrual basis (R. 40); but then seemed to suggest that they were a "combination" (R. 41).

Revenue Agent Rolph testified that Mr. Croessant fully cooperated with him and when the discrepancies were pointed out the defendant always insisted that whatever

was in his books was correct; that he must have made a mistake if the return did not coincide with the books (R. 9; 10; 15; 30).

Mr. Croessant denied any intent to deceive the Government when he filed his returns (R. 56-59). In trying to be "my own accountant" (R. 59), Mr. Croessant fell into error because while he entered a sale transaction on the date it was made (for instance, October 1942) he did not enter the payment for that particular sale (for instance, January 1943) on his books under the date the cash was received but, rather, went back to the sales date (R. 66). When asked on cross-examination why his return failed to include certain sales, he replied, "Well, there is only one reason I can give for that and that is the way I done my books. I done just exactly in making this thing up—I went ahead and when I figured up my worth I took—well, I can tell you better if I show you.

Here is December. I would start out in January and I would go down over my books and I would take for the month and pick out all the accounts that were paid in January. That there is what I would go down over" (R. 68, 69).

Mr. Croessant never had had a balance sheet, profit and loss statement or audit made (R. 75, 76). He answered financial inquiries by referring to his "income tax report" (R. 76).

Upon this state of the proof, Judge Bard denied petitioner's motions for judgment of acquittal (R. 78) and on July 19, 1949 sentenced him to imprisonment for 35 days and to pay a total fine of $1000 (R. 79). Judge Bard's Opinion appears at R. 77. On November 28, 1949 the Court of Appeals for the Third Circuit affirmed the conviction. Petition for rehearing was denied on December 28, 1949. The opinion of the Court of Appeals appears at R. 83.

B.

THE QUESTIONS PRESENTED.

1. Is one who filed an income tax return which he did not believe to be true and correct in that it understated his taxable income guilty of the offense of willful attempt to defeat or evade the tax as proscribed by section 145 (b) of the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. A. section 145 (b)?

2. In a prosecution for violation of section 145 (b) of the Internal Revenue Code must the necessary finding that the accused willfully *attempted* to defeat or evade the tax as defined by *Spies v. U. S.*, 317 U. S. 492, be based upon proof in addition to or other than proof that the income tax return to the knowledge of the defendant failed to state all of his income?

3. Was the evidence sufficient to sustain petitioner's conviction for violating section 145 (b) of the Internal Revenue Code?

4. Did the appellate court sanction petitioner's conviction on an incorrect theory necessitating the setting aside of the conviction?

C.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

In the decision sought to be reviewed, the Court of Appeals has decided an important question involving the imposition of criminal penalties for violation of the Internal Revenue Code in a way which definitely conflicts with the decision of the Fifth Circuit squarely on point, *Jones v. U. S.*, 164 F. 2d 398 (C. A. 5). In the *Jones* case, the taxpayer filed a return which stated some but not all of his income. The taxpayer was convicted after a trial conducted on the theory that the mere failure by a taxpayer who had filed a return to return all of his income and to pay the tax

on it when the taxpayer knew such tax was due constituted a willful attempt to defeat or evade the income tax in violation of Section 145 (b) of the Internal Revenue Code. The Court of Appeals for the Fifth Circuit reversed the conviction on the ground that this theory "was a wholly incorrect one". *Jones v. U. S.*, 164 F. 2d at 400. The Court of Appeals rejected the decision of the Fifth Circuit and upheld petitioner's conviction on that theory.

The decision of the Court of Appeals in the Third Circuit is also in direct conflict with the decision of this Honorable Court in *Spies v. U. S.*, 317 U. S. 492, 63 S. Ct. 364, 368, 87 L. Ed. 418, on which the Fifth Circuit relied when deciding the *Jones* case.

The decision of the court below is incorrect for another reason, not mentioned in *Jones v. U. S., supra.* Section 145 (c) of the Internal Revenue Code, 26 U. S. C. § 145 (c), specifically proscribes the filing of an income tax return which the taxpayer "does not believe to be true and correct as to every material matter". The penalty imposed for violation of this sub-section of section 145 is different from and *less than* that prescribed for violation of section 145 (b). Assuming that petitioner filed an income tax return which he knew did not state all of his taxable income his offense would be that proscribed by section 145 (c), but not that created by section 145 (b). Hence, the action of the lower court, if permitted to stand, will allow a taxpayer to be tried, convicted and punished for a more serious offense as being in violation of a statute only *generally,* if at all applicable, when his conduct at most is a lesser offense in violation of a statute *specifically* applicable.

As stated by Justice Jackson speaking for this Honorable Court in *Spies v. U. S.*, 317 U. S. 492, 595, 63 S. Ct. 364, 87 L. Ed. 418, 421: "Congress has imposed a variety of sanctions for the protection of the system and the revenues." This Honorable Court there held that a taxpayer can be convicted only of the specific offense proscribed in "this structure of sanctions" even though without such a

"structure of sanctions" it could be argued that general language found in the most serious of the various tax offenses [Section 145 (b)] is applicable.

That Congress intended conduct other than the filing of a false return to be proved before a taxpayer can be held guilty of violating section 145 (b) is apparent from a reading of section 3616 (a) of the Internal Revenue Code, 26 U. S. C. A. section 3616 (a), which provides:

> "Whenever any person . . . delivers or discloses to the collector . . . any false or fraudulent . . . return . . . with intent to defeat or evade the . . . assessment intended to be made . . ., he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both . . ."

It is clear that the penalty for engaging in conduct which consists only in the filing of a return which the taxpayer knows does not correctly state his income could be that provided by section 3616 (a) of the Internal Revenue Code or section 145 (c) of the Internal Revenue Code but certainly not section 145 (b) of the Internal Revenue Code. Cf. *Kirsch v. U. S.*, 174 F. 2d 595 (C. A. 8). In the *Kirsch* case the Court of Appeals for the Eighth Circuit declined to decide the question involved here because the record clearly disclosed other affirmative acts of evasion.

This case should be reviewed not merely because the decision of the court below is incorrect but also because if permitted to stand it will throw into confusion an important phase of the law protecting the revenues. The Treasury and Congress have publicly announced an intensification of the prosecution of those who violate the tax laws. From the Government's point of view, it would be most harmful to the accomplishment of this purpose to permit uncertainty to exist with respect to the exact limits of each subsection of section 145 of the Internal Revenue Code. From the standpoint of taxpayers, it is, of course, fundamental that there should be imposed only the precise sanc-

tions fixed by Congress (as interpreted by this Honorable Court). Prior to the *Spies* case, many United States attorneys proceeded on the incorrect assumption that section 145 (b) (which penalizes the willful attempt to defeat or evade the tax) was a catch-all section. Taxpayers were prosecuted and wrongfully convicted under section 145 (b) for willful failure to file any tax return and willful failure to pay the tax without in addition thereto conducting their affairs in a manner so as to hide their income. Since the *Spies* case, these prosecutions must be brought under section 145 (a) (the section which is in terms applicable to such conduct). The *Spies* case eliminated the confusion which had previously reigned as to the relation of section 145 (a) to section 145 (b). Petitioner submits that the time is now ripe and his case peculiarly appropriate for this Honorable Court to clear up the confusion regarding the relation of section 145 (c) to section 145 (b). Section 145 (c) is obviously intended to cover the precise case of one who knowingly files a return which does not state all his income (i. e., a false and fraudulent return). The Fifth Circuit has correctly held that such conduct does not violate section 145 (b), contrary to the ruling in this case. A decision by this Honorable Court will correctly chart the course for the thousands of tax prosecutions which have been publicly announced as being underway or in the process of investigation.

Certainly, if as petitioner contends, one who without more files a return which does not state all of his income, violates section 145 (c) but *not* section 145 (b), the challenge to his conviction cannot be dismissed as a "mere technicality." It would be contrary to our entire legal tradition and policy to sustain a conviction for violation of section 145 (b) simply because the prosecuting attorney proceeded under the wrong section. "A man shall not be charged with one crime and convicted of another": Marshall, C. J., in *The Hoppet v. U. S.*, 7 Cranch 389, 393; cf. *Cole v. Arkansas*, 333 U. S. 196; *Sinclair v. U. S.*, U. S. (decided January 9, 1950).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the Third Circuit commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in this suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

Dated: January, 1950.

GEORGE F. CROESSANT,
Petitioner.

By:
DAVID BERGER,
THOMAS D. MCBRIDE,
WILLIAM J. DUIKER,
PAUL D. EDELMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT SQUARELY ON POINT.

Petitioner concedes that where the proof discloses that the taxpayer so conducted *his business and financial affairs as to hide or conceal* his taxable income the evidence suffices to sustain a conviction for willfully *attempting* to defeat or evade the tax as proscribed by section 145 (b) of the Internal Revenue Code, 53 Stat. 63, 26 U. S. C. A. section 145 (b). Proof singly or in the aggregate that the taxpayer kept no books, or a double set of books; that he made false entries; that he made false invoices or other documents; that he destroyed books or records; that he concealed assets or covered up sources of income would certainly justify a conviction for willfully attempting to defeat or evade the tax. *Spies v. U. S.*, 317 U. S. 492, 63 S. Ct. 364, 87 L. ed. 418. In each of such instances, the taxpayer of course knowingly files a false and fraudulent return, if he files any return at all.

In such cases, the precise question here raised is not passed upon. *Cave v. U. S.*, 159 F. 2d 464 (C. A. 8); *Myres v. U. S.*, 174 F. 2d 329 (C. A. 8); *Barrow v. U. S.*, 171 F. 2d 286 (C. A. 5), and *Bryan v. United States*, 175 F. 2d 223 (C. A. 5), are not squarely in point because in each the taxpayer who filed a return so conducted his business and financial affairs as to hide or conceal his taxable income. In *Cave v. U. S.*, the taxpayer kept no books whatsoever. In *Myres v. U. S.*, the taxpayer destroyed important records and documents which disclosed the source and extent of his taxable income. In *Barrow v. U. S.*, the taxpayer kept no books. In *Bryan v. U. S.*, the taxpayer

destroyed his records. In each of these cases the taxpayer not only knowingly filed returns which were false and fraudulent in that they understated income but *in addition* the taxpayer affirmatively conducted his business and financial affairs in such a manner that he *concealed* and hid his income, thereby attempting both to *defeat* and *evade* the tax which he knew was due. Hence, under the principles of the *Spies* and *Jones* cases, the convictions in *Cave, Myres* and *Barrow* were proper.[1] *Kirsch v. U. S.*, 174 F. 2d 595 (C. A. 8).

But the precise question here is whether *without* any *concealment* or *hiding* of income in the conduct of the taxpayer's business and financial affairs, the willful attempt to defeat or evade the tax is made out. That is, whether in view of the fact that his conduct is proscribed by section 145 (c) or section 3616 (a) one who files an income tax return which he knows does not state all of his income but whose books and records are in perfect order with no attempt to hide or conceal income, is guilty of a willful attempt to defeat or evade the tax as proscribed by section 145 (b).

The only case other than petitioner's which meets this question squarely is *Jones v. U. S.*, 164 F. 2d 398 (C. A. 5). There Judge Hutcheson speaking for the Fifth Circuit specifically held that one who merely filed a return which he knew did not state all of his income was not guilty of the offense of willfully attempting to defeat or evade the income tax. The conviction was reversed because the trial judge tried the case on the theory that the mere knowing

[1] The *Bryan* case is an excellent example of the difficulty in convicting a taxpayer who, in addition to understating his income destroys his records. There, the Court of Appeals held that the Government failed to make out a case sufficient to go to the jury on proof of net worth, but granted a new trial instead of a discharge. This Court affirmed that procedure in *Bryan v. U. S.*, U. S. , decided January 16, 1950. It is logical to impose a more severe penalty when the taxpayer thus conceals his income.

failure of the taxpayer to include all of his income in his return, coupled with his failure to pay the tax, "knowing it was due" (164 F. 2d at 401) constituted the offense of willfully attempting to defeat or evade the tax under section 145 (b). This theory was held to be "a wholly incorrect one." 164 F. 2d at 401.

In the petitioner's case the Court of Appeals rejected this holding of the *Jones* case and sustained petitioner's conviction of willfully attempting to defeat or evade the tax merely on proof that the taxpayer filed a return which he knew did not state all of his income even though the Government conceded at the trial that there was no concealment or hiding of income by the petitioner in the handling of his business and financial affairs (30a).

Hence, there is a direct conflict between the decision of the Third Circuit in petitioner's case and that of the Fifth Circuit in *Jones v. U. S.*, 164 F. 2d 398.

In addition, for reasons amplified below, petitioner contends that the decision in his case conflicts with and is contrary to the underlying principle of *Spies v. U. S.*, 317 U. S. 492, 63 S. Ct. 364, 87 L. ed. 418.

II.

THE DECISION OF THE FIFTH CIRCUIT IN JONES V. U. S. IS CORRECT AND THE INSTANT DECISION IS INCORRECT.

A.

Petitioner's Guilt, if Any, Can Only Be Predicated on Violation of Section 145 (c) or Section 3616 (a).

For the purpose of this argument it will be assumed that petitioner filed his return knowing that it did not state all of his income. The Government concedes there was no hiding or concealment of petitioner's income (R. 30).

Section 145 (c) of the Internal Revenue Code, 26 U. S. C. A. section 145 (c) provides that "any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter,

shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code."

It is clear that one who files a return which he *knows* does not state all of his income "makes and subscribes a return which he does not believe to be true and correct as to every material matter" and is therefore guilty of violating section 145 (c). Guilt could also be predicated upon section 3616 (a) since there has been a delivery of a false or fraudulent return with intent to defeat or evade the assessment. There is no need, therefore, to stretch 145 (b) (which imposes a penalty for the "willful attempt to defeat or evade the tax") to reach this case. Clearly, the language of 145 (b) does not in express terms cover conduct consisting only of the filing of a return which the taxpayer knows does not state all of his income. Moreover, under section 145 (b) a more severe penalty may be imposed than that prescribed by either section 145 (c) [2] or section 3616 (a).

In determining guilt it is essential to invoke the precise sanction of the "variety of sanctions for the protection of the system and the revenues." *Spies v. U. S.*, 317 U. S. at 495, 87 L. ed. at 421. In that case, this Court held that conduct falling within section 145 (a) could not be treated as a violation of section 145 (b). By the same reasoning, conduct falling within section 145 (c) cannot be treated as a violation of section 145 (b).

These are separate and different offenses. If petitioner is correct, as he earnestly contends, his conviction for violating section 145 (b) cannot be sustained on the ground that his conduct transgressed section 145 (c). Cf. *Sinclair v. U. S.*, U. S. , decided January 9, 1950; *Cole v. Arkansas*, 333 U. S. 196.

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[2] The maximum fine for violation of section 145 (b) is $10,000 as against a maximum fine of $2,000 for violation of section 145 (c). The penalty for violation of section 3616 (a) is a maximum fine of $1,000 or one year's imprisonment. See footnote 3.

It is fundamental that "A man shall not be charged with one crime and convicted of another . . ." Marshall, C. J., in *The Hoppet v. U. S.*, 7 Cranch 389, 393.

B.

The Inference of Willful Attempt Which Is a Pre-Requisite to the Finding That the Accused Violated Section 145 (b) Must Be Based on Some Proof Other Than That Necessary to Make Out the Offenses of Willful Failure to Return Income and Willful Failure to Pay the Tax.

Section 145 (b) of the Internal Revenue Code makes a felon of "any person who wilfully attempts in any manner to evade or defeat any tax imposed." To predicate guilt under this section, there must be proof beyond a reasonable doubt of (a) the requisite mental state and (b) that affirmative conduct which constitutes an "attempt" to evade or defeat the tax. Obviously, proof of the requisite mental state without proof of that requisite affirmative conduct which constitutes an "attempt" is insufficient. *Spies v. U. S.*, 317 U. S. 492. This Court there demonstrated the necessity for sharply distinguishing among the various offenses created by section 145 of the Internal Revenue Code. Section 145 (a) creates the offenses of willful failure to return income and willful failure to pay the tax. Section 145 (c) creates the offense of willful making and subscribing a return which the taxpayer does not believe to be true and correct as to every material matter. Section 3616 (a) creates the specific offense of delivery of a false and fraudulent return with intent to defeat or evade the assessment. All four offenses carry different penalties.[3] These offenses are separate and dif-

[3] Section 145 (a) prescribes as a penalty for the willful failure to return income or to pay tax a fine of not more than $10,000.00 or imprisonment for not more than one year or both. This offense is a misdemeanor.

Section 145 (b) prescribes as the penalty for the willful attempt to defeat or evade the tax a fine of not more than

ferent from each other, the offenses penalized by Section 145 (a), 145 (c) and 3616 (a) each differ from the crime of willful attempt to defeat or evade the tax as created by Section 145 (b).

Before conduct can constitute a willful and positive attempt to defeat the tax, it must be such affirmative action by the taxpayer, "the likely effect of which would be to mislead or to conceal." *Spies v. U. S.*, 317 U. S. at 499. Justice Jackson illustrated such conduct as including "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind." To be sure, this list is not all inclusive, nor was it so intended. Nevertheless, by accepted principles of logic and under the doctrine of *ejusdem generis,* (see *F. W. Fitch Co. v. U. S.*, 323 U. S. 582, 585, 586) it is clear that the kind of conduct which constitutes an attempt to defeat or evade the tax is activity related to the taxpayer's fiscal and financial dealings and not his action or omission in filing or failing to file

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$10,000.00 or imprisonment for not more than five years or both. This offense is a felony.

Section 145 (c) does not prescribe a specific penalty except to provide that any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and upon conviction thereof shall be subject to the penalties prescribed for perjury in Section 125 of the Criminal Code. Section 125 of the Criminal Code, 18 U. S. C. A. Section 231 prescribes the penalty of a fine of not more than $2,000.00 and imprisonment of not more than five years. This section was repeated. The revised Criminal Code, 18 U. S. C. A. Section 1621 provides as a penalty for perjury a fine of not more than $2,000.00 or imprisonment for not more than five years or both.

Section 3616 (a) prescribes a maximum penalty of $1,000 fine and one year's imprisonment for the delivery of a false and fraudulent return with intent to evade the assessment.

tax returns or failing to report income or failing to pay all or part of the tax due. As this Court has demonstrated, Congress intended different penalties (the most severe being for violation of § 145 (b), the willful attempt to defeat or evade the tax) and different offenses in the various situations covered by section 145. Unless the taxpayer, in addition to filing no return or a return in which he failed to state all of his income, has so conducted his business and financial affairs as to make likely the effect of *hiding* his taxable income, the most serious offense has not been committed and the most severe penalties are not appropriate.

The *Spies* case lays down another rule of great importance in the understanding of these differing tax offenses. The inference of willful attempt which must be drawn before the accused can be found guilty of violating section 145 (b) must be based on some proof in the case other than that necessary to make out the offenses of willful failure to return income and willful failure to pay the tax. *Spies v. U. S.*, 317 U. S. 492, 500. As Judge Hutcheson has pointed out, in commenting upon the *Spies* case, in *Jones v. U. S.*, 164 F. 2nd 398, 400, the Supreme Court has definitely settled "that the mere failure to return income and pay the tax on it, though the taxpayer knew that it was due, would not constitute the offense of willfully attempting to defeat and evade the income tax" and the Supreme Court has further stated "that something more than this must be shown".

A taxpayer may be guilty of violating section 145 (a) (willful failure to return or pay income tax) in two situations: (1) where no return at all is filed, and (2) where a return is filed but where the return does not state all of the taxpayer's income. In the second situation, the taxpayer has failed to return income just as in the first situation. It is of no consquence whether the failure is to return *any* income or is a failure to return *all* income (by returning some, but not all of the taxable income). If any

distinction should be drawn, it would seem that one who files no return and hence pays no tax is a worse offender than one who at least files a return and pays some, if not all of the tax due. In any event, Judge Hutcheson in the *Jones* case makes it eminently clear that where the prosecution is for violation of Section 145 (b), (that is, for willful attempt to defeat or evade the tax) it makes no difference whether the failure to return income results from filing no return or from filing a return which does not state all the income. Neither failure singly or together, constitutes the attempt to defeat or evade.

As already pointed out, where a return is filed which does not state all income and the taxpayer knows this fact when he signs and files it that a prosecution for violation of section 145 (c) or 3616 (a) would lie. Certainly, under the principle of the *Spies* and *Jones* cases, before the jury can find the accused guilty of violating section 145 (b), the inference of willful attempt to defeat or evade the tax must be based on some proof other than or in addition to the fact that the return as filed failed to state all of the income and that the taxpayer knew this fact when he signed and made the return. If there is no such proof there can be no conviction for violation of Section 145 (b).

III.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION OF WILLFULLY ATTEMPTING TO EVADE OR DEFEAT THE TAX.

A.

There Was No Intent to Evade Tax.

The only possible basis for finding an intent to evade the tax is the underpayment of tax ultimately found due for each of the four years. While such a discrepancy may in certain cases be sufficient to warrant the inference of fraudulent intent, we contend that it is insufficient in this

case. Petitioner was engaged in a legitimate business. He kept proper books and records. He made not the slightest effort to hide his taxable income. He cooperated with the revenue agents "one hundred percent" and at all times denied any intent to cheat the government, saying that the figures on his books were correct and that if there was a discrepancy between the figures on his return and those on his books the latter were correct and those on his return were the result of a mistake.

The evidence in this case leads to the conclusion that a mistake was made. Petitioner, a man of mechanics who worked all his life with his hands, chose to prepare his own returns, despite the fact that he was working at his plant from 12 to 20 hours each day on essential war work (R. 51). He prepared his returns without the assistance of an accountant or lawyer. Considering the unorthodox set of self-designed books in which were reflected $150,000 worth of sales, receipts, and disbursements each year, and that he did his own figuring without even the help of a bookkeeper, it would have been a miracle had he arrived at the correct results.

It is submitted that all of these circumstances are at least as consistent with innocence of evil motive as with guilt and hence the conviction cannot be sustained. *U. S. v. Russo,* 123 F. 2d 420 (CA 3); *U. S. v. Tatcher,* 131 F. 2d 1002 (CA 3); *U. S. v. Laffman,* 152 F. 2d 393 (CA 3); Cf. *Bryan v. U. S.,* 175 F. 2d 223 (CA 5).

But, even if the inference of evil motive is supportable by this record, there is no proof of a willful attempt to evade the tax.

B.

There Was No Proof Upon Which the Inference of Willful Attempt to Evade the Tax Could Be Based.

We contend that this record does not warrant the finding that Petitioner filed his income tax returns with the fraudulent motive of cheating the Treasury out of taxes.

But, even assuming that such a wrongful motive can be found on this record, it goes no further than that petitioner willfully failed to return income and pay the tax on it. As we have demonstrated, such proof is insufficient to warrant the inference of a willful attempt to defeat or evade the tax. *Spies v. U. S.*, 317 U. S. 492, 500. *Jones v. U. S.*, 164 F. 2d 398, 401 (CA 5).

The Government's theory was that petitioner's mere failure to return income is sufficient to make him guilty of violating section 145 (b). Government counsel stated at the outset, "the evasion consists of two things, sir; a failure to report sales and an overstatement of expenses incurred in the sales"[4] (R. 7). The Internal Revenue Agent testified that "All his sales were reported in his books, sir" (R. 29). All of his sales receipts were deposited in his bank account (R. 13; 15). There were no fictitious entries of "expenses" in the books. He kept no double set of books. He made no false entries or alterations. He issued no false invoices or documents. He destroyed no books or records. He concealed no assets. He covered up no sources of income. He did not handle his affairs to avoid making the records usual in transactions such as he engaged in. In short, the appellant did not hide his taxable income. He did not try to hide his income. In the language of the *Spies* case, he did not so conduct his business or fiscal affairs as to make likely the effect of *hiding* his taxable income. Therefore, he did not violate section 145 (b).

The trial judge wholly accepted the Government's theory. The trial judge conceded that there was but "an omission to include taxable income in a tax return" (R. 77). Yet he held that "when a wilful omission is made in the tax return combined with the deliberate intent to defeat or evade the tax, as in this case, then it would seem that the defendant's actions are more than a passive neg-

[4] The overstatement of expenses is only charged with respect to 1942 and 1943 (Counts 1 and 2).

lect of the statutory duty. Such a combination of wilful omission and deliberate intent to evade the tax constitutes the positive attempt that lifts the offense to the degree of felony as denounced by the provisions of Section 145 (b)" (R. 77). The fallacy in this reasoning is the failure to recognize that "willful omission" by *hypothesis* includes a "deliberate intent to evade the tax". The word "willful" as used in section 145 means the act or omission was done with a wrongful motive; that is, with intent to evade or defeat the tax. *Spies v. U. S.*, 317 U. S. at 497, 498. Therefore, when you add "deliberate intent to evade" to "wilful omission" you add nothing. The "combination" spoken of by the trial judge is not a combination. It is saying the same thing twice. As we have demonstrated, in addition to the requisite *mental* element ("willful"; "deliberate intent to evade"; "wrongful motive"), there must be such affirmative conduct as constitutes an *attempt* to evade. Under the trial judge's findings there is only the requisite mental state. There is no such affirmative conduct as constitutes an attempt to evade. Therefore, the conviction for violation of section 145 (b) cannot stand. *Spies v. U. S.*, 317 U. S. 492.

The Court of Appeals sustained the conviction upon the ground that "There is substance, we think, in distinguishing between failing to file a return and knowingly filing a false one" (R. 85). We agree that there is such a distinction. Congress also recognized such a distinction. That is the reason sections 145 (c) and 3616 (a) were enacted: to penalize those who knowingly file returns which do not correctly state the incomes of the taxpayers. Not only do sections 145 (c) and 3616 (a) cover that situation but we submit that only sections 145 (c) or 3616 (a) apply where there has been no hiding or concealment of income by keeping no records, wrong records, by destroying records or by otherwise taking affirmative action to prevent discovery of a taxpayer's income.

CONCLUSION.

The decision of the Court of Appeals is in direct conflict with that of the Fifth Circuit on the substantive question of the theory upon which petitioner was convicted (that his mere filing of a return which he knew failed to state all of his income was a willful attempt to defeat or evade the tax). There is thus a conflict upon one of the most important questions involved in the application of the penal provisions of the taxing statute. Untold numbers of cases are directly affected by the question of whether the Fifth Circuit's view of section 145 (b) or that of the Third Circuit prevails. If only to clarify the confusion that exists, it is submitted that certiorari should be granted—more particularly since the Fifth Circuit's interpretation of section 145 (b) is correct and within the principles of *Spies v. U. S.*, 317 U. S. 492, 63 S. Ct. 364, 368, 87 L. ed. 418 in contrast with the decision of the Court below which is clearly incorrect and violative of the reasoning of this Court in the *Spies* case.

It is submitted that the petitioner's conviction should be reviewed and set aside.

Respectfully submitted,

GEORGE F. CROESSANT,
Petitioner.

By:
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877283—50

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 591

GEORGE F. CROESSANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no formal opinion at judgment. Its opinion denying a motion for judgment of acquittal (R. 77–78) is reported at 84 F. Supp. 514. The opinion of the Court of Appeals (R. 83–86) is reported at 178 F. 2d 96.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949. (R. 87.) A petition for rehearing was denied on December 28, 1949. (R. 91.) The time for filing a petition for a writ of certiorari was extended by Mr. Justice Burton to and including February 10,

1950 (R. 92), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether a conviction under Section 145 (b) of the Internal Revenue Code—penalizing a willful attempt in any manner to evade or defeat a tax—may be sustained where the knowing filing of a false and fraudulent return constitutes the affirmative willful attempt to evade and defeat the tax.

2. Whether the evidence was sufficient to sustain the petitioner's conviction under Section 145 (b) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for

not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

The petitioner was charged in a four count indictment, returned in the Eastern District of Pennsylvania, with having wilfully attempted to defeat and evade a large part of his individual tax liability for the calendar years 1942 to 1945, inclusive, in violation of Section 145 (b) of the Internal Revenue Code, by filing and causing to be filed for each calendar year a false and fraudulent tax return. The indictment contained the following material allegations as to the respective charges (R. 3–5):

Calendar year	Income reported	Actual income	Tax reported	Actual tax due
1942	$35,078.82	$86,022.98	$15,388.74	$52,562.62
1943	44,143.69	81,502.46	26,495.59	51,330.87
1944	35,116.60	45,116.60	16,878.40	23,922.45
1945	32,668.79	51,882.32	15,219.71	29,023.21

The petitioner was tried before Judge Guy K. Bard, sitting without a jury. (R. 6.) The petitioner was found guilty as charged and sentence was imposed as follows: imprisonment for 35 days and a fine of $250 as to count 1; a fine of $250 as to each of counts 2, 3 and 4, the petitioner to be imprisoned pending compliance. (R. 79.) The Court of Appeals affirmed (R. 87).

The petitioner operated a machine shop and employed some 30 to 42 individuals. During 1943 to 1946 he employed no accountant. He had devised his own system of keeping books. (R. 34, 51.)

The revenue agent commenced an examination of the petitioner's books on January 15, 1947, making a comparison of these with the original returns filed by petitioner for each of the years involved. He found that as to each year there was a discrepancy between the amount of sales reported on the return and those disclosed by the records, resulting in the following amounts of understatement of net income in the returns: 1942—$34,115.64 (R. 11); 1943—$29,272.49 (R. 11); 1944—$10,000 (R. 9); 1945—$19,213.53 (R. 10). By the same method of comparison the revenue agent further ascertained that the petitioner's returns for 1942 and 1943 had overstated expenses, resulting in the following additional amounts of understated net income: 1942—$16,838.92 (R. 11, 16); 1943—$8,086.28 (R. 11, 24). Included in the total overstatement of expenses for 1942 was a claim in the return for that year in the amount of $1,554.97 for advertising expenses. The advertising account on the petitioner's books for 1942 was recorded as an expenditure of only $54.97. (R. 16–17.) Similarly, for 1943 the petitioner's books showed an advertising expense of $535.39; the petitioner, however, claimed $1,535.38 on his return. (R. 25.)

After the investigation in this case had commenced, the petitioner retained a certified public accountant who filed amended returns for each of the calendar years involved, in which, except for a few dollars, the petitioner reported the full amount of the tax for each year charged by the Government to be owing. The amended returns were prepared by the certified public accountant from the petitioner's books and records. (R. 8, 35.)

The petitioner was not able to explain the aforementioned discrepancies between the amounts of sales and expenses as shown by his records and the returns filed. He stated that his records correctly reflected all of the business net income which should have been reported in his tax returns (R. 9, 10, 29, 30); that he had just made a mistake and wanted to get it straightened out (R. 15).

The total sales shown on the petitioner's books agreed with the bank deposits made. (R. 14.) The bank deposits represented sales, exclusively. (R. 13, 52.) During 1942, the petitioner's bank deposits had increased over-all by $32,000 and he had made personal withdrawals of approximately $40,000. He reported a net income of approximately $35,000 for 1942, although the total of the increase in bank deposits and withdrawals was approximately $72,000. During 1943, the petitioner's bank deposits increased in the amount of $800 and his personal withdrawals amounted

to $77,000. The net income which he reported for 1943 was approximately $44,000, as compared with the total of bank account increases and withdrawals in the amount of $77,838.34. During 1944, the petitioner's personal withdrawals were approximately $33,000 and his cash position increased by $11,434. The net income which he reported for 1944 was approximately $35,000, as compared with the total of the bank deposit increases and withdrawals of approximately $45,000. The relationship of the amounts reported for each year to the total of bank deposit increases and withdrawals did not strike the petitioner as being odd. (R. 73.)

The petitioner prepared the returns for each of the years involved without assistance from anyone. This conformed to his practice since he had begun business in 1925. (R. 15.) Miss Dorothy Gish, his bookkeeper, billing clerk and secretary, testified that during the period of her employment (1943 to 1946) the petitioner would go into his private office "from time to time for several days—maybe for a week, * * *" during the income tax period but that she was not able to tell how much time the petitioner devoted to "the income tax." The figures appearing in the tax returns (for 1944 and 1945) were handed to her by the petitioner and all that she did was to type them in the returns. (R. 31–32.)

ARGUMENT

I

Petitioner relies on *Spies* v. *United States*, 317 U. S. 492, to support his primary contention that the offense of attempted tax evasion proscribed by Section 145 (b) of the Internal Revenue Code cannot be proved by a showing that a defendant filed a false income tax return, that he knew it was false, and that he willfully attempted to defeat and evade taxes by filing such a false return. But, contrary to petitioner's claim, the *Spies* case does not demand that in every Section 145 (b) prosecution there be proof of concealment of income in the conduct of the taxpayer's business or financial affairs (Pet. 11, 12, 16, 17, 20), nor does it require that in a tax evasion case the willful attempt to evade and defeat the tax be constituted by an affirmative act *other* than the knowing filing of a false and fraudulent return.

Spies was a no-return case in which the Government based its charge of willfully attempted evasion upon the defendant's failure to file. The Court held that this omission, i. e. the non-observance of the statutory duty to make a return (defined as a misdemeanor under Section 145 (a) of the Code), could not constitute the affirmative action contemplated by the use of the term "attempt" in Section 145 (b). 317 U. S., at 499. By way of illustration only, the Court enumerated certain acts from which "affirmative

willful attempt may be inferred," even in a case in which there is "default in filing the return and paying the tax" (pp. 499–500). That the list did not include the act of filing a false and fraudulent return cannot avail petitioner, since it is obvious that such an affirmative act would not be pertinent to a case involving no return at all. On the contrary, it is clear that this Court did not intend to foreclose consideration, in a case in which a return is made, of the filing of a false and fraudulent return as a means of attempted evasion. The Court not only warned (p. 499):

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."

but it specifically announced that "affirmative willful attempt may be inferred from * * * *any conduct, the likely effect of which would be to mislead or to conceal*" (italics supplied).

Nor is the court below in conflict with the Fifth Circuit. In *Jones* v. *United States,* 164 F. 2d 398 (C. A. 5), the conviction was reversed because the trial court, in addition to other serious errors, had apparently instructed the jury that a knowing failure to return the taxpayer's full income was sufficient, in itself, for conviction

under Section 145 (b). Here, on the other hand, the trial judge expressly found not only a "wilful omission * * * in the tax return" but, in addition, he also found that combined with that omission there was a "deliberate intent to evade the tax (R. 77).[1] Furthermore, if the *Jones* opinion ever created any doubt as to how the Court of Appeals for the Fifth Circuit had read the *Spies* decision, the Fifth Circuit has decisively negatived any conflict with the court below by its later decision in *Barrow* v. *United States,* 171 F. 2d 286, which is in square accord with the instant holding. The Eighth Circuit also appears to be in agreement. *Cave* v. *United States,* 159 F. 2d 464, 466–467, certiorari denied, 331 U. S. 847; *Myres* v. *United States,* 174 F. 2d 329, 334, certiorari denied, 338

[1] Petitioner erroneously asserts that the prosecution's theory was that his mere failure to return income is sufficient to make him guilty of violating Section 145 (b), and that the trial judge accepted this theory (Pet. 20). The court's findings, referred to above, show that the court entertained no such misconception. Nor did the Government proceed on this theory. Petitioner's contention rests solely on a statement of Government counsel that "the evasion consists of two things, * * *; a failure to report sales and an overstatement of expenses incurred in the sales" (R. 7). It is clear from a reading of the entire record that this statement was not intended as an exposition of the theory of the Government's case. It merely purported to explain how the petitioner's understatement of net income, an essential element in the prosecution's case, was effected, and in that context it was clearly correct.

U. S. 849; cf. *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8).

It may be assumed, for present purposes, that the evidence in this case would have supported convictions for the lesser offenses, dealing with false returns, established by Section 145 (c) and Section 3616 (a) of the Internal Revenue Code. It does not follow, of course, that these facts cannot also sustain a conviction under Section 145 (b), nor that prosecution must be had only under the narrower provisions. See *Taylor* v. *United States,* C. A. 9, decided January 19, 1950 (1950 P-H, par. 72, 376), rejecting contentions similar to those advanced here.

II

The evidence was sufficient to sustain a conviction under Section 145 (b). All of the elements of the offense defined by this Section were proved: (a) the petitioner substantially understated his net income for each of the years involved; (b) he attempted to evade and defeat by filing false and fraudulent returns; (c) he did the latter willfully. In this connection, it is of course not necessary that the Government prove willfulness or deliberate intent to evade by direct evidence; it may be inferred from all of the circumstances in a case. *Tinkoff* v. *United States,* 86 F. 2d 868 (C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715; *Paschen* v. *United States,* 70 F. 2d 491 (C. A. 7); *United*

States v. *Commerford,* 64 F. 2d 28 (C. A. 2), certiorari denied, 289 U. S. 759; *Cooper* v. *United States,* 9 F. 2d 216 (C. A. 8).

CONCLUSION

The decision below is in all respects correct, and there is no occasion for further review. No conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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